Supreme Court, U.S.
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NO. 94-132

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CAROLEE STEPHENSON AND BETTYLU STEPHENSON, ALSO KNOWN AS BETTYLU ZEH,

Petitioners,

-vs-

WESTERN FARMERS ELECTRIC COOPERATIVE, OF ANADARKO, OKLAHOMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

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August 12, 1994

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25 pp

QUESTIONS PRESENTED

1. Did either petitioner raise the questions of federal due process under the Fourteenth Amendment to the United States Constitution at any stage of the proceedings in either the court of first instance or appellate courts of the State of Oklahoma?

2. Is there a substantial federal question in state court approval of service of notice upon one avoiding such service, made by leaving the notice at her residence door while she was present refusing to open the door, immediately after telephoning her from the residence driveway to tell her what the notice was and where it would be left?

3. Does failure to require negotiation with one cotenant before condemnation proceedings after the other cotenant has refused to negotiate present a substantial federal question?

PARTIES

The parties are as shown in the caption.

Respondent, Western Farmers Electric Cooperative, is an Oklahoma rural electric cooperative with offices at Anadarko, Oklahoma, supplying wholesale electric power to its members: Alfalfa Electric Cooperative, Inc., Caddo Electric Cooperative, Canadian Valley Electric Cooperative, Inc., Choctaw Electric Cooperative, Inc., Cimarron Electric Cooperative, Cotton Electric Cooperative, Inc., East Central Oklahoma Electric Cooperative, Inc., Harmon Electric Association, Inc., Kay Electric Cooperative, Kiamichi Electric Cooperative, Inc., Kiwash Electric Cooperative, Inc., Northfork Electric Cooperative, Inc., Northwestern Electric Cooperative, Inc., Oklahoma Electric Cooperative, People's Electric Cooperative, Red River Valley Rural Electric Association, Rural Electric Cooperative, Inc., Southeastern Electric Cooperative, Inc., Southwest Rural Electric Association, Inc., all of which are Oklahoma rural electric Cooperatives, and the United States of America, acting through the Altus Air Force Base, Department of Defense.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Western Farmers Electric Cooperative, of Anadarko, Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the petitioners, Carolee Stephenson and Bettylu Stephenson, also known as Bettylu Zeh.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution would be involved if there were any question of violation of federal due process presented. 66 Oklahoma Statutes 1991 (hereafter cited as O.S. 1991), Sec. 53 B, cited in the petition for certiorari, governs the notice to be given in condemnation proceedings.

However, 27 O.S. 1991, Section 13, cited in the petition, has no application to these proceedings, under the provisions of 27 O.S. 1991, Section 15:

> "The provisions of Section 5 (Title 27 section 13) create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation."

Rather, the applicable statutes are 18 O.S. 1991, Sec. 437.2:

> "A cooperative shall have power:
>
> "(o) To have and exercise the right of eminent domain in the same manner and by like proceedings as provided for railroad corporations under the laws of this state."

and 66 O.S. 1991, Sec. 53A:

> "If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right of way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three disinterested freeholders, to be selected by said judge as commissioners, and who shall not be interested in a like question.

THE NATURE OF THE CASE

This is an eminent domain proceeding in which respondent sought a right of way easement for an electric transmission line across land owned by petitioners as cotenants.

The statement of petitioners omits the evidence offered by respondent, which is summarized here.

Irene Abbott, respondent's right of way agent, testified (T4, 18-35) that she wrote letters to each petitioner requesting the easement and making an offer, but petitioner Bettylu's letter was returned "unclaimed". Bettylu admitted (T4, 4-5) that the address on the letter sent to her was her correct address. Afterward, Abbott

went to that address in person, but found no one there. Abbott did communicate with petitioner Carolee by telephone and in person, but Carolee refused to grant the easement and gave Abbott a letter advising that if respondent sought judgment, it would cost respondent "hundreds of thousands" of dollars. Thereafter condemnation proceedings were instituted.

With reference to the service of notice here, the process servers, Shadid and Kirby, testified (T3, 15-34) that they drove to petitioner Carolee's residence and called her residence phone number on their mobile phone from the driveway of her residence. Carolee answered and identified herself, but when Shadid told her what papers he had and that he was taking them to her door, Carolee said she was not interested and hung up. Shadid immediately went from the car to the door of Carolee's residence, knocked loudly, then saw a window curtain move and Carolee look out the window. When there was no answer, he called out that he knew Carolee was there and he was leaving the papers at the door. Carolee admitted (T3, 6-9) that she was at her home the day in question, that she received the telephone call, and that the papers stayed at her door until she removed them and threw them away three weeks later, and further that she had been avoiding service for several months.

Commissioners were duly appointed, assessed the damages sustained by petitioners, filed their report and respondent has appointed the amount so assessed with the

state court at first instance. Petitioners have not filed a demand for jury trial on the issue of damages, but filed objection to the report of commissioners on the issues of service of notice and prior negotiations.

ARGUMENT AND AUTHORITIES

1. Certiorari should be denied because petitioners have failed to raise any federal question to the state court of first instance or to its appellate courts, but in both pleadings and arguments have alleged violation of state law and procedure.

2. Certiorari should be denied because no substantial federal question has been presented either on the question of notice or on the question of pre-condemnation negotiation.

a. As to service of notice, service upon one who was avoiding service by leaving the papers in some appropriate place in his or her presence where it will most likely come into his possession was held by the state courts to be valid service in compliance with its statutes, in accordance with the overwhelming weight of authority, including two cases in which service was made in the same manner and this Court denied certiorari.

b. As to negotiation with one cotenant when the other cotenant having refused to negotiate as being unnecessary because futile, this ruling of the state courts was in acquaintance with prior state and federal cases holding that the requirement for negotiation is a creature of state statutes and is not required under due process, again including cases in which this Court has denied certiorari.

1. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS HAVE FAILED TO RAISE A FEDERAL QUESTION IN THE STATE COURTS.

The petition for certiorari fails to show any stage of the state court proceedings at which petitioners raised a federal question, but all pleadings, argument and briefs in the state courts asserted lack of jurisdiction under Oklahoma statutes. The motion to quash was on the basis that service of summons in a manner prescribed by statute had not been made. Their objection to report of commissioners was based on failure to make an attempt to reach an agreement, which can be based only on state statute. Their petition in error to the Oklahoma Supreme Court stated as the points of law urged as error:

"1. The trial court erred when determining that personal service sufficient for a condemnation action was obtained for merely calling Carolee Stephenson's home and leaving papers at her door.

"2. The trial court erred when determining that the appellee legitimately attempted to negotiate with Bettylu Zeh to acquire her interest in the subject realty."

The record in this case is like that in F.E. Oxley Stave Co. v. Butler Co., 166 U.S. 648, 17 S.Ct. 709, 1897, where the opinion states:

"Looking into the record, we do not find that any reference was made in the court of original jurisdiction to the constitution of the United States. Nor can it be found in the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any federal right, privilege or immunity was intended to be asserted. For aught that appears, the state court proceeded in its determination of the cause without any thought that it was expected to decide a federal question."

There this Court held that the jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place beyond question that the party bringing a case here from such court intended to assert a federal right.

2. CERTIORARI SHOULD BE DENIED FOR FAILURE TO PRESENT A SUBSTANTIAL FEDERAL QUESTION ON EITHER NOTICE OR PRE-CONDEMNATION NEGOTIATION.

a. NO SUBSTANTIAL FEDERAL QUESTION AS TO NOTICE.

The Oklahoma statute governing notice in these condemnation proceedings is 66 O.S. 1991, Sec. 53B, which provides:

> "The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen years of age, * * *"

The undisputed evidence is that the notice was left with petitioner Carolee at her place of residence after she had been told by telephone from her residence driveway to her residence number it was being brought to her door, and was left at her door after she failed to answer the door when the process server knocked. Petitioner

admitted being at her residence, receiving the telephone call, and that papers were left at her door. Under these circumstances, the Oklahoma courts followed the overwhelming weight of authority in holding that where facts occur that would convince a reasonable person that personal service was being attempted, service cannot be avoided by refusing to take the document in hand, but service may be effected by depositing the paper in some appropriate place in his or her presence where it would most likely come into his or her possession.

So in International Controls Corporation v. Vesco, 593 F.2d 166, (CA - 2 N.Y., 1979), approving the service of summons thrown over a fence and left there, the opinion states:

> "The summons and complaint were clearly 'left' at Vesco's residence, and Judge Stewart so found in his opinion of May 2, 1978. As in the case of the service made by Mrs. Yohonn, we think there was clear compliance with the constitutional requirements of due process."

Certiorari was denied by this Court at 442 U.S. 941, 61 L.Ed. 311, 99 S.Ct. 2884.

Again in Peoples Trust Co. of Beryen County v. Kozuck, 103 N.J. Super, 151, 236 A.2d 630, afd 103 N.J. Super. 151, 246 A.2d 744, under similar circumstances the court held:

> "It is generally held that when a summons is offered to someone, he cannot avoid service by refusing physically to accept the summons if he is informed that service of summons is being attempted. * * * "

Certiorari was denied by this Court at 395 U.S. 966, 89 S.Ct. 2111. At least ten other state jurisdictions have adopted the same rule.[1]

Petitioners cite no authority whatever, and we know of none, which supports their claim that due process requires in hand delivery of notice. Most of the cases from this Court cited by petitioners were those in which the service was by publication only. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652, this Court's opinion stated at P.314:

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[1] Riggin v. Dierdorff, Ark., 790 S.W. 2d 987;
Ex Parte Ball, Cal. App., 38 P.2d 411;
Trujillo v. Trujillo, Cal. App., 162 P.2d 640;
Haney v. Olin Corp. (Fla. App.) 245 So. 2d 669, 671;
Libermann v. Commercial Nat'l Bank of Broward County (Fla. App.), 256 So. 2d 63;
Hatmaker v. Hatmaker (Ill. App.) 85 NE 2d 345;
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Woud v. Weenig (Utah App.) 736 P.2d 1053;
Thayer v. Edmonds (Wash. App.) 503 P.2d 1110;
United Pacific Ins. Co. v. Discount Co., (Wash. App.) 556 P.2d 699.

> "Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to non residents. We disturb none of the established rules on these subjects."

The requirement set forth in the cases from this Court is, as stated at P.314 of Mullane, above, is:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (citing cases) The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance. (citing cases) But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

The notice and service here meets all these requirements, as shown by the fact that petitioners with their attorney were present and participated at every hearing involving them.

b. NO SUBSTANTIAL FEDERAL QUESTION AS TO PRE-CONDEMNATION NEGOTIATION.

Petitioners attempt to establish some kind of right under 27 O.S. 1991 Sec. 13, as cited at pages 3, 4 and 17 of their petition for certiorari. However, they ignore 27 O.S. 1991 Sec. 15, about which the Oklahoma Court of Appeals stated in Western Farmers Electric Cooperative v. Willard, Okl. App., 726 P.2d 361, concerning this section:

> "However, Landowners seem to be unaware that this statement is a statement of policy only. 27 O.S. Sec. 15 specifically provides as such. This section states:
>
> 'The provisions of (sec. 13) create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.'
>
> "Consequently the trial court was correct in denying Landowners' objections based on Appellee's alleged failure to comply with Section 13."

Petitioners cite Koch v. Oklahoma Turnpike Authority, 208 Okl. 556, 257 P.2d 790 (1953) as authority for the rule that it is necessary that a condemnor allege and prove it made a bona fide effort to acquire the property by purchase before instituting condemnation proceedings. However the opinion in that case states:

> "We think this contention, as a general rule, under a statute like our own, is correct. *** This rule, however, has its exceptions. In Am Jur. Eminent Domain, Sec. 319, it is said:
>
> > '*** Where an offer to one joint owner, as to his undivided interest, fails there is no necessity for further negotiation.*** 'when an attempt to agree upon value would be futile, no attempt need be made.'"

Koch, above, held that since a minor's interest could not be acquired by purchase, it was not essential that it make an effort to acquire by purchase the interest of the adult owner.

The applicable statute, 66 O.S. 1991, Sec. 53A provides:

> "If the owner of any real property or interest therein. * * * shall refuse to grant the right

> of way through and over his premises, the district judge * * *" (emphasis ours).

shall appoint commissioners. Petitioner Carolee, owner of an interest in the land, did refuse to grant the right of way and under the language of the statute, respondent was entitled to have commissioners appointed.

Again, under these circumstances, the Oklahoma courts have followed the overwhelming weight of authority for the rule that no negotiation with a co-owner is necessary if negotiation with another co-owner fails.

In Town of Darien v. Kavookjian, (Conn.) 202 A.2d 147 (1964), the Connecticut Supreme Court held:

> "Moreover, where an offer to one joint owner as to his undivided interest in the property fails, there is no necessity for further negotiation with the other owner."

This Court denied certiorari at 379 U.S. 840, 85 S.Ct. 79 (1965). Several other jurisdictions have adopted this rule.[2]

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[2]Boeck v. State Highway Commission (Wis.) 153 N.W. 2d 610;
City of Dallas v. Arnoff (Tex Civ. App.) 316 S.W. 2d 301;
Commonwealth v. Southern Hill Nurseries (Ky.) 343 S.W. 2d 842;
M.& A. Electric Power Cooperative v. Georger (Mo.), 480 S.W. 2d 868;
Public Service Co. v. Recktenwald, (Ill.) 125 N.t. 271;
Rogers v. Cosgrave, (Neb.) 153 N.W. 569;
Town of Hereford v. Harris (N.C.), 140 S.E. 2d 420.

Petitioners have cited no case, and we know of none, holding that a landowner has a constitutional right to prior negotiation. All such rights depend on a statute so providing.

No case from this Court cited by petitioners has any application to the facts and issues in this case, but hold upon the facts of those cases that property may not be taken without due process of law.

CONCLUSION

Petitioners failed to raise a federal question in the court of first instance or appellate courts of the State of Oklahoma.

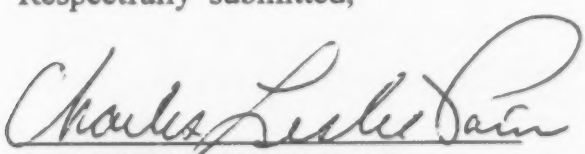
Petitioners have failed to present a substantial federal question with respect to the notice served on the petitioner avoiding notice, following the same rule adopted by many other jurisdictions, including the federal jurisdiction, in at least two of which this Court denied certiorari. If there was no substantial federal question presented in those cases, none has been presented here.

Petitioners have cited no authority from this Court or otherwise tending to show that the right to negotiation of damages before condemnation proceedings is a constitutional right rather than entirely a creature of state statute, particularly as to the futility in attempting to negotiate with one co-owner after the other co-owner has refused.

Petitioners have shown no decision of another state, of a United States Court of Appeals, or of this Court which conflicts with the decisions of the Oklahoma courts in this case.

For these reasons, certiorari should be denied.

Respectfully submitted,



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